No. 93-333 (3)

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Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Without ever addressing the central issue presented in the petition —— whether choice-of-law and forum selection clauses contained in a foreign issuer's standard documentation can be enforced in the face of the anti-waiver provisions of the 1933 and 1934 Acts, when enforcement deprives American investors of basic rights and remedies under the Acts —— respondents present a flurry of inaccurate and disingenuous arguments in urging the Court to deny the petition.

In brief, respondents argue that (1) Lloyd's is unique and the Court of Appeals' decision is so intensively fact based that other issuers will be unable to rely on the decision to justify use of similar clauses to avoid the requirements of the 1933 and 1934 Acts (Opposition at 15); (2) the Court of Appeals' standard for enforcing the anti-waiver provisions is not novel, as petitioners contend, but instead solidly based on precedent from this Court (Opposition at 14-

15); (3) petitioners' argument about the anti-waiver provisions, and in particular about the phrases "waive compliance" and "essential feature", was not presented to the courts below, and petitioners have supposedly "conceded" that the prospect of a future dismissal of their claims under §12(2), Rule 10b-5 and RICO undermines petitioners' basis for *certiorari* (Opposition at 5-6, 18-19, 20); (4) investments in Lloyd's syndicates are not full-fledged securities under the 1933 and 1934 Acts (Opposition at 3); and (5) the SEC has already expressed the views that petitioners did not purchase securities that require registration and that Lloyd's choice-of-law and forum selection clauses are enforceable (Opposition at 20 n.19, 23). Each of these arguments is wrong. Petitioners address the first three contentions in Point I, and the remaining two contentions in Point II.

Point I: This Court Should Review the Court of Appeals' Novel Test —— Under Which Any Foreign Issuer Can Avoid Securities Regulation —— for Determining Whether There Has Been a Violation of the Anti-Waiver Provisions.

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), Justice Kennedy set forth this Court's standard for finding violation of the anti-waiver provisions. Reflecting a view that appeared to have the Court's unanimous support, he wrote that impairment of an "essential feature" of the 1933 or 1934 Acts, such as a shift in the burden of proving lack of scienter, would be barred by the anti-waiver provisions. 490 U.S. at 481.

The test applied by the Court of Appeals here eviscerates that standard. Under the Court of Appeals' test, impairment of the remedial provisions of the Acts, and an increased burden in the proof required to sustain a claim, do not violate the anti-waiver provisions. Prohibited waiver will only be found where there is substantial impairment of the Acts' transactional mandates, caused, for example, by insufficient incentive under foreign law to deter exploitation of American investors. Contrary to Justice Kennedy's clear statement in *Rodriguez*, the Court of Appeals' test severs "transactional" compliance from "remedial" compliance.

It is the Court of Appeals' test that is unique in this context, and not any special feature of Lloyd's. It is that test's virtual elimination of the anti-waiver provisions that makes the Court of Appeals' decision broadly applicable to all foreign issuers. Nothing in the facts or in the Court of Appeals' analysis limits its holding to Lloyd's.

Respondents ignore *Rodriguez* and the novelty of the Court of Appeals' test. Instead of focussing on Justice Kennedy's statements about impairment of essential, remedial rights, they cite *The Bremen* and *Scherk* as the "pattern" for the Court of Appeals' test. (*The Bremen* has nothing to do with statutory anti-waiver provisions or laws creating federal rights, and neither case offers any precedent for the Court of Appeals' test).

Respondents claim, erroneously, that petitioners did not raise the "essential features" argument below. In fact, petitioners relied on *Rodriguez* below (see petitioners' Brief on Appeal, pp 32-36) and raised the anti-waiver clauses at every stage of this proceeding. At oral argument before the Court of Appeals, considerable attention was paid to the details of the test employed by this Court for finding violation of the anti-waiver provisions, and the "essential features" test was explored then.

Respondents also contend, erroneously, that petitioners have conceded that the only claims this petition seeks to preserve are those brought under §12(1) and that petitioners have abandoned their effort to litigate in American courts, under American law, claims under §12(2), Rule 10b-5 and RICO.[1] The questions presented for review

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[1] In extraordinary disregard for the carefully constructed system of regulation under the federal securities laws, respondents characterize the §12(1) claims as a "tempest in a teapot". (Opposition at 6). To the contrary, the disclosures mandated under §12(1) are at the heart of the securities laws. *See SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

Respondents also note, as if it were a concession, that petitioners do not seek review of the district court's dismissal of their claims against the

(continued...)

by this Court concern the Court of Appeals' ruling about the anti-waiver provisions, not the underlying claims. But beginning with the statement of the questions presented (Petition at i) and continuing throughout, petitioners have made clear that none of the claims have been abandoned.

Respondents contend (Opposition at 18) that petitioners have abandoned their §12(2) claims because (1) respondents supposedly showed "conclusively" (despite an unchallenged affidavit to the contrary submitted by petitioners to the district court) that English and American laws are the same regarding responsibility for misleading omissions.[2], and (2) differences between American and English law regarding proof of scienter and causation should be disregarded as not fundamentally unfair.

By that very argument, respondents demonstrate that they have failed to satisfy the test set forth by this Court in *Rodriguez*. Significantly different standards in England for the kinds of omissions that would render a prospectus misleading, and imposition by English law of burdens to prove scienter and causation, would deprive aggrieved American investors of remedies granted to them by §12(2). The Court of Appeals (although in error, petitioners contend, in many of its conclusions about English law) found that those differences exist. (Petition at 24c-26c). It is those differences that present precisely the kind of impairment of essential features prohibited under this Court's *Rodriguez* standard.

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[1](...continued)
syndicates on the ground that the syndicates' lack of juridical status under English law precluded their being sued under the securities laws. That question is not presented for review here because the Court of Appeals did not reach it, but instead resolved it, for argument's sake, in petitioners' favor.

[2] Moreover, petitioners showed that under long-standing lower court precedent the syndicate lists disseminated to Lloyd's investors are sufficient to trigger the obligation to disclose omitted facts under §12(2) and Rule 10b-5.

Point II: The SEC Has Not Expressed a View about Petitioners' Claims. It Should Be Invited to Submit its Views Now.

Contrary to respondents' contention (Opposition at 23), the SEC has never determined that "petitioners held no 'security' that required registration." Nor has the SEC ever indicated that the question of the enforceability of the choice-of-law and forum selection clauses in the context of this case is moot. (Opposition at 19, 20n.19, 23.) The only pronouncement by the SEC cited by respondents, an August 5, 1991 letter from the SEC's Mary Beach to Representative Pease (Opposition at RA-2-5), suggests that no such determination has been made. Ms. Beach wrote: "*if* the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by [petitioner] Mr. Roby and others, the staff may consider whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate." (emphasis added.)[3]

Despite respondents' suggestions to the contrary (*e.g.*, Opposition at 3), it is indisputable that investments in Lloyd's

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[3] Respondents have reviewed the 1987-88 correspondence between counsel for Lloyd's and the SEC that was obtained in response to a Freedom of Information Act request. From that correspondence, initiated by Lloyd's at the time it was preparing to expand its recruitment of American investors, it appears that the proposed method of offering was not, in fact, the method used in selling Lloyd's securities to American investors. For example, Lloyd's submitted to the SEC a hypothetical sample private offering memorandum, and undertook that there would be no general solicitations of American investors. Even the limited disclosures in that sample memorandum were not made to American investors before they made their investment decisions, and there were intensive group solicitations.

syndicates are securities under the federal securities laws.[4] The Court of Appeals declined to rule on whether the investments constitute securities (Petition at 10c), noting that the SEC has provided little guidance on the issue. In Ms. Beach's letter to Representative Pease (quoted above), the SEC stated unequivocally that investments in Lloyd's syndicates are securities. (Opposition at RA-5).

In light of respondents' inaccurate portrayal of the SEC's views (formulated in a letter by a staff attorney in response to hypothetical facts and divorced from those alleged here), and in light of the irreconcilable inconsistency between the SEC's current efforts to regulate foreign issuers (Petition Appendix I-K) and the Court of Appeals' decision here, petitioners respectfully urge this Court to ask the SEC for its views in a brief *amicus curiae*.

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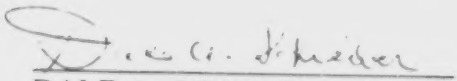
[4] Lloyd's securities are investment contracts, since each "involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). Investors' commitment of assets to the syndicates is certainly a monetary investment under *Howey*. *See, e.g., International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 559 (1979); *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Because all investors who participate in a syndicate pool their funds to finance the syndicate's underwriting activities, investors' participations involve "horizontal" commonality; and because "the fortunes of investors and [syndicates] are linked so that they rise and fall together," investors' participations also involve "vertical" commonality. *Dooner v. NMI, Ltd.*, 725 F. Supp. 153, 159 (S.D.N.Y. 1989) Investors expect to derive profits solely from the efforts of others (the Active Underwriters), through "a participation in earnings resulting from the use of investors' funds...." *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 14, 1993

Respectfully submitted,



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